

**Office of Chief Counsel
Internal Revenue Service
memorandum**

Number: **201051021**

Release Date: 12/23/2010

CC:ITA:4:
PRES-136823-10

[Third Party Communication:
Date of Communication: <Month> DD, YYYY]

UILC: 139D.00-00

date: October 19, 2010

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subject: Child of Members of an Indian Tribe who are Divorced, Separated, or Living Apart
and section 139D

This Chief Counsel Advice responds to your request for assistance. This advice may
not be used or cited as precedent.

ISSUE:

May parents who are members of an Indian tribe and who are divorced, separated, or
living apart treat their child as a dependent of both parents for purposes of § 139D of
the Internal Revenue Code?

CONCLUSION:

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Parents who are members of an Indian tribe and who are divorced, separated, or living apart may treat their child as a dependent of both parents for purposes of § 139D.

LAW AND ANALYSIS:

Congress added § 139D to the Code in the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 199. It provides, in general, that gross income does not include the value of any qualified Indian health care benefit. Section 139D defines the term “qualified Indian health care benefit” to include certain medical care and accident or health coverage provided to a member of an Indian tribe, including a spouse or dependent of the member.

For purposes of § 139D, the term “medical care” has the same meaning as in § 213, and the terms “accident or health insurance” and “accident or health plan” have the same meaning as in § 105. Under §§ 105(b) and 213(d)(5), a child to whom § 152(e) applies is treated as a dependent of both parents.

Section 139D(c)(5) provides that the term “dependent” has the meaning as in § 152, with certain modifications. Section 139D does not specifically address whether a child of parents who are divorced, separated, or living apart is treated as a dependent of both parents.

Rev. Proc. 2008-48, 2008-36 I.R.B. 586, describes the circumstances in which the Internal Revenue Service will treat a child of parents who are divorced, separated, or living apart as the dependent of both parents for purposes of §§ 105(b), 106(a), 132(h)(2)(B), 213(d)(5), 220(d)(2), and 223(d)(2). The revenue procedure concludes that, for purposes of those tax provisions, the Service will treat a child of parents who are divorced, separated, or living apart as a dependent of both parents, whether or not the custodial parent has released the claim to the exemption for the child under § 152(e)(2). The revenue procedure applies to taxpayers who are divorced, legally separated under a decree of divorce or separate maintenance, legally separated under a written separation agreement, or live apart at all times for the last 6 months of the calendar year; and who are the parents of a child who: (1) receives over one-half of the child's support during the calendar year from the child's parents, (2) is in the custody of one or both parents for more than one-half of the calendar year, and (3) qualifies under § 152 (c) or § 152 (d) as a qualifying child or qualifying relative of one of the child's parents.

Section 139D incorporates the definitions of “medical care” used in § 213 and “accident or health insurance” and “accident or health plan” used in § 105, and under those provisions, a child of parents who are divorced, separated, or living apart is treated as the dependent of both parents. Therefore, the Service will apply Rev. Proc. 2008-48 for purposes of § 139D. Accordingly, taxpayers who are within the scope of Rev. Proc. 2008-48 and who are members of an Indian tribe may treat their child as a dependent of both parents for purposes of § 139D, whether or not the custodial parent releases the

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claim to the exemption for the child under § 152(e)(2). If only one parent within the scope of Rev. Proc. 2008-48 is a member of an Indian tribe, that parent may treat the child as a dependent for purposes of § 139D.

Please call Sheldon Iskow at (202) 622-4920 if you have any further questions.